UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MARC E. JACKSON
United States Air Force

ACM S30998

16 February 2007

Sentence adjudged 17 August 2005 by SPCM convened at Dyess Air Force Base, Texas. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, and Major Nurit Anderson.

Before

BROWN, MATHEWS, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

THOMPSON, Judge:

In accordance with his pleas, the appellant was convicted of wrongful use of marijuana and wrongful distribution of methamphetamine, both in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A military judge, sitting alone as a special court-martial, sentenced the appellant to a bad-conduct discharge, confinement for 4 months, and reduction to E-1. The convening authority approved the findings and sentence as adjudged. On appeal, the appellant asserts that the staff judge advocate's recommendation (SJAR) misstated the military judge's recommendation for clemency,

and that the convening authority did not provide a written action on the appellant's deferment request. Finding no error, we affirm.

Clemency Recommendation in the SJAR

After she imposed the sentence, the military judge noted that the appellant would enter a no-pay status when his enlistment expired on 15 October 2005. The military judge also stated:

> During the time between now and when [the appellant] goes into a no-pay status, I do recommend, even though I know that the methamphetamine was obtained for his spouse now—girlfriend at the time— that there be, during this time when he's still receiving pay, that under those provisions, the convening authority consider providing pay for his family, since he has two dependents.

In his recommendation to the convening authority, however, the staff judge advocate (SJA) said that the military judge "recommended that you consider providing pay for [appellant's] family when he enters no-pay status."

The appellant did not comment on the SJAR after it was served on him. Failure to comment on an error in the SJAR results in waiver unless it is prejudicial under a plain error analysis. Rule for Courts-Martial (R.C.M.) 1106(f)(6); *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). To prevail, the appellant must show there was an error, that it was plain and obvious, and that it materially prejudiced a substantial right of the appellant. *United States v. Capers*, 62 M.J. 268, 269 (C.A.A.F. 2005) (citations omitted); *see also* Article 59(a), UCMJ, 10 U.S.C. § 859(a). When errors occur in the SJAR, the prejudice prong is a relatively low threshold. *United States v. Scalo*, 60 M.J. 435, 437 (C.A.A.F. 2005) (citing *Kho*, 54 M.J. at 65). Although the threshold is low, the appellant must still demonstrate a colorable showing of possible prejudice. *Scalo*, 60 M.J. at 436-37.

R.C.M. 1106(d)(3)(B) requires that the SJAR include "concise information" as to a recommendation for clemency made by the sentencing authority. Although the SJAR in this case did not reflect the exact wording used by the military judge, it did inform the convening authority that the military judge was recommending clemency, specifically in the form of providing financial support for the appellant's family. We find, therefore, that the error in the SJAR was neither plain nor obvious.

Even if we were to conclude, *arguendo*, that the error in the SJAR was plain and obvious, we find that there has been no colorable showing of prejudice. *See Capers*, 62 M.J. at 270*; see also United States v. Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999); *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998). Although the military judge's precise

recommendation was misstated in the SJAR, the convening authority was fully informed of exactly what that recommendation was. In his clemency request, dated 8 September 2005, the trial defense counsel provided the convening authority with the page from the trial transcript containing the military judge's recommendation. In his addendum to the SJAR, the SJA listed that page as attachment 7, "Trial Transcript Excerpt – Judge's Recommendation to Grant the Waiver." The SJA informed the convening authority that he "must consider all written matters submitted by the defense." Thus the convening authority knew exactly what the military judge recommended before taking action on the case and the appellant was not prejudiced by the wording in the SJAR.

Deferment Request

The appellant argues that the convening authority failed to meet the requirements of R.C.M. 1101(c)(3) because there is no evidence in the record that he took any action on the appellant's deferment and waiver request, dated 25 August 2005. On 18 October 2006, appellate government counsel moved to admit a 19 September 2005 memorandum in which the convening authority took action on the appellant's deferment and waiver request. This Court granted the motion on 20 October 2006, and thus the appellant's assertion of error is now without merit.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator